Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF RCN CORPORATION

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REPLY COMMENTS OF RCN CORPORATION

RCN Corporation ("RCN") hereby submits its Reply Comments in the above-captioned matter. Initial comments filed by the industry demonstrate that there is a significant need for the Commission to adopt a federal mandatory access requirement ("FMAR"). In light of the comments filed, RCN believes its proposed FMAR provides a balance of interests among all parties, is jurisdictionally sound, and will promote competitive facilities-based networks.

I. THE COMMISSION SHOULD ADOPT A FEDERAL MANDATORY ACCESS REQUIREMENT

At a minimum, the comments submitted in this proceeding thus far demonstrate the multifaceted, individual interests involved in bringing the competitive communications market to end-users located in MTEs. While these interests are significant, they are also self-serving and frequently conflict. In resolving the complex issues presented in this proceeding, the Commission should focus on its paramount obligation - to bring the benefits of the Telecommunication Act of 1996 ("1996 Act") to all Americans, including those living or working in MTEs. The adoption of RCN's proposed FMAR would be an important first step to meet the urgent need to ensure that MTE end-users will have a competitive choice, while also clarifying the rights of all parties involved, an action that ultimately benefits the entire marketplace.

In its initial comments, RCN urged the Commission to develop inside wiring rules that express a universal policy to compel those who own or operate inside wiring or the facilities or spaces in which such wiring is or can be installed, to make such wiring or facilities available on reasonable, nondiscriminatory, and equitable terms to all service providers regardless of the technology used or the regulatory category under which the provider operates. RCN explained that this overarching inside wiring policy would be embodied in a FMAR and would apply to incumbent local exchange carriers, incumbent cable operators, building owners or managers, and public utilities who own, operate, or control facilities within MTEs.

Numerous industry members filed comments supporting the establishment of an FMAR. Sprint Corporation pointed out correctly that the Commission has previously found national rules

to be necessary.[1/] The Commission adopted national rules in its *Local Competition Order*[2/] to implement the competitive mandate of the 1996 Act. The Congressional competitive mandate and compelling circumstances that warranted such nationwide action by the Commission in the *Local Competition Order* also exist in this proceeding. Similar to the market in existence at the time the Commission considered the *Local Competition Order*, the MTE market is currently controlled by monopolists who have unfair leverage over new entrants. The incumbent service providers have bottleneck control over the MTE entrance facility and the network up to, and sometime beyond, the demarcation point. The MTE building owner has bottleneck control over the in-building facilities and, therefore, all the bargaining power regarding access to MTE end-users.[3/]

The Wireless Communications Association International, Inc. ("Wireless Association") also supports the adoption of a FMAR for MTEs, noting that the Commission could take additional steps to facilitate access in later proceedings or legislative reform.[4/] The Wireless Association observes

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[1/] Comments of Sprint Corporation at 4.

[2/] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No,. 96-98, *First Report and Order*, 11 FCC Rcd. 15499 (1996), *aff'd in part and vacated in part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 7353 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), *appeals docketed*, *Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr. 16, 1999). ("*Local Competition Order*").

[3/] Comments of Sprint Corporation at 4.

[4/] Comments of Wireless Communications Association International, Inc. at 24.

that until the Commission adopts a federal access policy, consumers will continue to be forced into a "Hobson's choice of (1) purchasing service from a provider not of his or her own choice or (2) moving to another property where such choice is permitted."[5/] The majority of commenters support adoption of an FMAR and, as demonstrated from the numerous and diverse comments, the industry would benefit greatly from some guidance in this very contentious area, which is currently blocking facilities-based development within MTEs.

II. THREE PRINCIPLES SHOULD GOVERN ACCESS TO MTE END-USERS

Rather than attempting to tailor the existing telephone inside wiring rules to the cable inside wiring rules, or to construct elaborate, complex but inevitably incomplete rules, as the Commission has done in the case of cable inside wiring, RCN suggests that initially the FMAR simply articulate three fundamental and interlocking principles along with basic implementing rules. Later, in subsequent stages of this proceeding, the Commission can consider and refine specific regulations. The comments filed in this proceeding, when viewed in the aggregate, support such an approach. This approach balances the interests of all parties, is jurisdictionally sound, and, most importantly, advances the goal of the 1996 Act to make competitive services available to all Americans.

In its comments, RCN set forth three constituent principles that would articulate the federal MTE access policy. These principles refocus and reorient all parties on basic rights, but also provide

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[5/] *Id.* at 25. Numerous comments note, however, that the theoretical ability for an MTE end-user to change locations is frequently not a realistic option. *See, e.g.* Comments of Fixed Wireless Communications Coalition at 6; Comments of Teligent, Inc. at 13-15.

flexibility for the industries involved to develop new approaches to reach MTE end users and to protect individual property rights.

> **End - User Principle**: MTE end-users should have a right to receive communications services from any entity that is willing to provide such service and has been properly certificated by duly constituted authority.

No party disputes the right of an MTE end-user to choose a service provider of his or her own choice. This principle protects an MTE end-user's congressionally mandated right to seek the benefits of competitive choice. It is clear that the Commission has the authority to adopt such a principle that specifically reflects basic principles set forth in the Act.

Notwithstanding the explicit mandate in the Act, it is necessary that this paramount interest be recognized and adopted as part of the Commission's FMAR. Current market conditions impede the end-user's right as evidenced by the multitude of examples provided in the comments. Competitive carriers have inundated the record with examples of ILEC and building owner anticompetitive practices that prevent MTE end-users from subscribing to the service provider of their choice. The building owner should not be permitted to choose the service provider for their tenants, nor should the ILEC do so. As urged by Adelphia Business Solutions, the Commission must affirmatively establish rules that assert the MTE end-user's right to subscribe to the carrier of his or her choice.[6/] Setting forth this principle in the FMAR will significantly contribute to ensuring that this Congressional mandate will ultimately drive the end results.

[6/] Comments of Adelphia Business Solutions at 5.

> **Services Provider Principle**: Entities wishing to serve MTE end-users, and who have the proper certification, should be able to do so either by the payment of a nondiscriminatory and reasonable fee to the owner of any existing inside wiring, facilities, conduits, or rights of way, or by installing new distribution facilities pursuant to agreement with the MTE owner/manager.

This principle protects the right of the service provider to serve those end-users who wish to subscribe to their services. This principle is embodied in the 1996 Act which seeks to bring competitive carriers into the local exchange marketplace. Without competitive service providers, competition, and its inherent benefits, will never be realized. The 1996 Act prohibits anticompetitive actions that inhibit the ability of a service provider to compete; and the Commission has authority to adopt a principle that prevents such hindrances to competition. Competitive service providers have the right to serve consumers who subscribe to their service. The rewards of competitor innovation, efficiency, and hard work should not be frustrated by intransigent MTE owners. RCN will not reiterate here the legal arguments advanced by numerous commenters that support the Commission's authority to adopt this principle. RCN simply notes that the principle requires nondiscriminatory treatment by those property owners who offer their premises to the public for use. Moreover, the principle does not impose uncompensated use of property. As demonstrated by the third principle set forth below, the MTE Owner Principle, the MTE property owner retains the right to negotiate nondiscriminatory terms, conditions and rates for access. Indeed, adoption of the Services Provider principle along with the other two principles creates a healthy tension between interested parties and ensures that all parties will negotiate fairly.

> **MTE Owner Principle**: MTE owners should be obliged to provide building access to all duly certificated entities wishing to serve end-users, on nondiscriminatory and reasonable terms and conditions.

While this principle imposes an obligation on the MTE owner to allow its residents the right to choose a service provider and to permit access to service providers, this principle also protects the MTE owner's right to determine the terms, conditions and rates for access. A nondiscriminatory requirement would simply mandate that property owners negotiate access arrangements with competitive service providers on a nondiscriminatory basis. The MTE owner would still be able to negotiate terms and conditions - on a nondiscriminatory basis - by which the competitors gain access.[7/] RCN agrees with Sprint that any agreement negotiated by the utility with the building owner would have to allow new entrants access to the facilities under the same rates, terms, and conditions as are available to the utility, "to the extent such access is physically possible without compromising safety, reliability and generally applicable engineering principles."[8/]

As demonstrated by the various legal arguments advanced in the initial round of comments, the Commission has the authority to require private building owners to provide nondiscriminatory access to competitive service providers.[9/] The Commission has historically regulated agreements

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[7/] Comments of Sprint Corporation at 12; Comments of WinStar Communications at 26.

[8/] Comments of Sprint Corporation at 12.

[9/] *E.g.*, Comments of AT&T Corp. at 5; Comments of Association for Local Telecommunications Services at 21; Comments of Adelphia Communications, Inc. at 8; Comments of Level 3 Communications, LLC at 13; Comments of RCN Corporation at 22; Comments of Personal Industry Association at 18-23; Comments of Sprint Corporation at 16; Comments of Teligent, Inc. at 49-51; Comments of WinStar Communications, Inc. at 30-37.

entered into by carriers subject to its jurisdiction, even if such agreements involve entities that potentially fall outside the Commission's direct jurisdictional reach.[10/]

Adoption of these principles in an FMAR will empower each interested party and will facilitate negotiations that will ultimately allow the MTE end-user to choose the service provider of his or her choice. RCN urges the Commission to act swiftly in adopting these broad inside wiring principles. The 30 percent of residences, small businesses, home offices and other end-users who need access to modern telecommunications and are located within MTEs are currently not receiving the full benefits of the "emergence of convergence." As noted by Metromedia Fiber Network Services, access guidelines will allow service providers to build their networks faster and efficiently, reaching MTE end-users sooner rather than later.[11/]

III. TO ENSURE DEVELOPMENT AND DEPLOYMENT OF INTEGRATED, ADVANCED SERVICES, THE FMAR SHOULD APPLY TO ALL SERVICE PROVIDERS INCLUDING TITLE II AND TITLE VI COMPETITORS

As recommended in RCN's initial comments, the FMAR should encompass both Title II and Title VI entities so that integrated providers are governed by one body of law. Furthermore, as cautioned by the Independent Cable & Telecommunications Association ("ICTA"), rules that may be procompetitive in one market may be anticompetitive in another. The Commission noted this

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[10/] Comments of Global Crossing Ltd. at 5 (citing *Cable & Wireless PLC v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999)(upholding the FCC's authority to issue order prohibiting U.S. carriers from paying foreign carriers more than certain benchmark rates for termination services); *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1082 (D.C. Cir. 1997)(Commission does not exceed its authority simply because a regulatory action effects entities outside of its jurisdiction.)).

[11/] Comments of Metro Fiber Network Services, Inc. at 7.

potential negative effect in its Notice of Proposed Rulemaking when it remarked that mandatory access rules may enable an incumbent cable operator to remain on the premises indefinitely. Thus, the trigger created by the Commission in the cable access rules to open the cable inside wiring to competitors would be effectively eliminated. The Commission must carefully develop rules to protect and promote competition in both markets.[12/] RNC's FMAR proposal would address ICTA's concern. One body of rules to govern Title II and Title VI providers would avoid adverse impacts on any type of service, prevent manipulation of Commission rules to gain unfair advantages and ensure fair treatment.

Extending existing cable inside wiring rules to telecommunications carriers will not suffice. As previously explained by RCN, the existing cable inside wiring rules have not facilitated the development of cable competition in MTEs. Realistically, most Americans continue to be denied a choice among cable providers. Time has demonstrated that there is little, if any, practical advantage to the cable inside wiring rules. Moreover, as noted by the ICTA, "extending the cable inside wiring rules to telecommunications carriers would not address" the failure of MTE wire configurations to permit competitive entry.[13/]

In addition to adopting rules that apply to all service providers, the Commission must be careful to make them technologically neutral. The advances in technology and the integration of services are evident in the comments filed in this proceeding. To diminish disruption and to offer

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[12/] Comments of Independent Cable & Telecommunications Association at 2-3.

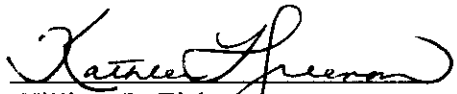
[13/] Comments of Independent Cable & Telecommunications Association at 7.

integrated services, competitive carriers have developed advancements in facilities to reach MTE end-users. Property owners claim to welcome these advancements and the ability to provision several services over the same medium. The FMAR proposed by RCN will allow for such developments.

IV. CONCLUSION

There is overwhelming evidence in this record that competitive service providers cannot reach MTE end-users. Building owners filed comments expressing their dedication to permitting competitive carriers access; however, building owners want to retain control over the terms, conditions and rates. RCN's proposal provides a balance for these competing interests while emphasizing the importance of a broad principle declaring parties' rights to a competitive environment.

Respectfully submitted,



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September 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 27th day of September, 1999, to the following:

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